

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHRISTOPHER H. ANDERSON,

Plaintiff,

V.

COUNTRY MUTUAL INSURANCE COMPANY,

Defendant.

CASE NO. C14-0048JLR

ORDER DIRECTING IN CAMERA REVIEW

I. INTRODUCTION

Before the court is Defendant Country Mutual Insurance Company’s (“Country Mutual”) renewed motion for a protective order. (Mot. (Dkt. # 29).) This is a discovery dispute. Country Mutual seeks to withhold certain documents it claims are protected by the attorney-client privilege. (*See id.*) Plaintiff Christopher Anderson argues that Country Mutual should be required to produce the documents pursuant to the Washington State Supreme Court’s decision in *Cedell v. Farmers Insurance Co. of Washington*, 295

1 P.3d 239 (Wash. 2013). The court concludes that, in order to determine which party is
2 correct, it is appropriate to conduct *in camera* review of the relevant documents.
3 Accordingly, the court ORDERS Country Mutual to submit the disputed documents to
4 the court for *in camera* review by Monday, August 18, 2014.

5 **II. BACKGROUND**

6 This is an insurance coverage case. Mr. Anderson owned a rental property in
7 Seattle's Seward Park neighborhood, and on December 26, 2012, the property caught
8 fire. (Compl. (Dkt. # 1-1) ¶ 3.1.) The fire caused extensive damage, so Mr. Anderson
9 made a claim on his insurance policy with Country Mutual. (*Id.* ¶¶ 3.1, 3.3.) Shortly
10 thereafter, Country Mutual discovered evidence that there had been a marijuana grow
11 operation located on the property. (Thielbar Decl. (Dkt. # 15) ¶ 4.) Consequently,
12 Country Mutual undertook an extensive investigation of Mr. Anderson's claim. (*Id.* ¶¶ 4-
13 8.) Country Mutual retained outside counsel—the Thenell Law Group, P.C.—to assist
14 with its investigation and coverage determination. (*Id.* ¶ 7.) Country Mutual eventually
15 denied Mr. Anderson's claim on October 14, 2013. (*Id.* ¶ 8.) In response, Mr. Anderson
16 brought this complaint alleging breach of contract, bad faith, and violations of
17 Washington's Consumer Protection Act and Insurance Fair Conduct Act. (Compl. ¶ 4.1.)

18 In May of this year, Country Mutual filed a motion for protective order. (5/20/14
19 Order (Dkt. # 13).) In the motion, Country Mutual asserted that certain documents that
20 Mr. Anderson had requested in discovery were protected by the attorney-client privilege.
21 (*See id.*) He requested that the court conduct an *in camera* review pursuant to the
22 Washington State Supreme Court's decision in *Cedell*. (*Id.*) Mr. Anderson opposed the

1 motion. (5/28/14 Resp. (Dkt. # 16).) The court requested, and received, additional
2 briefing in light of its then-recent ruling in *MKB Constructors v. American Zurich*
3 *Insurance Co.*, No. C13-0611JLR, 2014 WL 2526901 (W.D. Wash. May 27, 2014).
4 (6/9/14 Min. Order (Dkt. # 24).) The parties agreed that, in light of that ruling, Country
5 Mutual should amend its privilege log and Mr. Anderson should review the amended
6 privilege log. (See Pltf. Supp. Br. (Dkt. # 25) at 3; Def. Supp. Br. (Dkt. # 26) at 2.) This
7 occurred, and it appears that the scope of the dispute between the parties has been
8 narrowed considerably. (See Mot. at 2-3.) However, some 103 pages of documents
9 remain in dispute, so Country Mutual renewed its motion for a protective order on July
10 31, 2014. (*Id.*; Resp. (Dkt. # 31) at 2.) That motion is now before the court.

III. ANALYSIS

12 The parties' dispute centers on the attorney-client privilege. The attorney-client
13 privilege is a long standing doctrine established to "encourage full and frank
14 communication between attorneys and their clients and thereby promote broader public
15 interests in the observance of law and administration of justice." *Upjohn Co. v. United*
16 *States*, 449 U.S. 383, 389 (1981). When it applies, the privilege protects communications
17 made in confidence by clients to their lawyers for the purpose of obtaining legal advice.
18 *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Am. Standard Inc. v. Pfizer Inc.*, 828
19 F.2d 734, 745 (Fed. Cir. 1987).

20 In Washington, the attorney-client privilege applies differently in certain insurance
21 cases. In a first-party insurance bad faith action, the attorney-client privilege is
22 presumptively inapplicable. *Cedell*, 295 P.3d at 246. The Washington State Supreme

1 Court recently explained this in its opinion in *Cedell*. *Cedell* significantly altered
2 application of the attorney-client privilege in the context of first-party bad faith claims.
3 *See MKB*, 2014 WL 2526901, at *4. Most significantly, in such cases, *Cedell* creates a
4 “presumption that there is no attorney-client privilege relevant between the insured and
5 the insurer in the claims adjusting process, and that the attorney-client . . . privilege[is]
6 generally not relevant.” *Id.* (citing *Cedell*, 295 P.3d at 246). Nonetheless, an insurer may
7 overcome *Cedell*’s new “presumption of discoverability by showing its attorney was not
8 engaged in the quasi-fiduciary tasks of investigation and evaluating or processing the
9 claim, but instead in providing the insurer with counsel as to its own liability: for
10 example, whether or not coverage exists under the law.” *Cedell*, 295 P.3d at 246.

11 But that showing can itself be overcome. Even if an insurer demonstrates that an
12 attorney was not serving in a quasi-fiduciary role, under *Cedell*, an insured may still be
13 able to pierce the insurer’s assertion of attorney-client privilege. *See MKB*, 2014 WL
14 2526901, at *4. If the insured asserts that the insurer has engaged “in an act of bad faith
15 tantamount to civil fraud” and makes “a showing that a reasonable person would have a
16 reasonable belief that an act of bad faith has occurred” or that an insurer has engaged in a
17 “bad faith in attempt to defeat a meritorious claim,” then the insurer will be deemed to
18 have waived the privilege. *See Cedell*, 295 P.3d at 246-47. Obviously, something more
19 than an honest disagreement between the insurer and the insured about coverage under
20 the policy must be at play. *MKB Constructors v. Am. Zurich Ins. Co.*, No. C13-0611JLR,
21 2014 WL 3734286, at *7 (W.D. Wash. July 28, 2014).

22

1 One way of making these privilege determinations is to conduct *in camera* review.

2 Indeed, this procedure is mandatory in state court in Washington after *Cedell*. 295 P.3d

3 at 246. *Cedell* directs state trial courts to conduct *in camera* review of disputed

4 privileged documents at two points in the foregoing process—when the insurer asserts

5 that its attorney was not engaged in quasi-fiduciary tasks, *id.* at 246, and when the insured

6 asserts that the insurer has engaged in an act of bad faith tantamount to civil fraud, *id.* at

7 246-47. Unfortunately, in both circumstances, the Washington Supreme Court is not

8 clear whether demonstrating the required showing is a prerequisite to the *in camera*

9 review or whether evidence gleaned from the *in camera* review can be utilized to make

10 the necessary showing. *See id.*; *see also MKB*, 2014 WL 2526901, at *4 (discussing this

11 inconsistency in the *Cedell* opinion). In any event, in *MKB*, this court determined that

12 *Cedell's* *in camera* review requirement was procedural in nature and thus not mandatory

13 in federal court. *MKB*, 2014 WL 2526901, at *7 (“[T]he court may conduct *in camera*

14 reviews as described by the Washington Supreme Court in *Cedell*, but it is not bound to

15 do so.”).

16 Here, it would be difficult or impossible to resolve this dispute without conducting

17 *in camera* review. To do so, the court would have to rely solely on Country Mutual's

18 “4th Amended Privilege Log” (Dkt. # 30-5) to determine, with respect to each withheld

19 document, whether (a) the attorney was engaged in the quasi-fiduciary tasks of

20 investigation and evaluating or processing the claim or was instead providing the insurer

21 with counsel as to its own liability; and (b) the insurer committed “an act of bad faith

22 tantamount to civil fraud.” *See Cedell*, 295 P.3d at 246-47.

1 In the right case, this might be feasible. Whether a privilege log suffices to
2 conduct this inquiry will depend on the quality of the privilege log and the amount of
3 relevant detail and specificity included therein.

4 But it is not feasible in this case. Although Country Mutual's "4th Amended
5 Privilege Log" contains a substantial amount of necessary detail, it is still insufficient for
6 the court to undertake the inquiries described above. For example, the privilege log
7 describes documents in broad language, such as:

8 Email from [Thenell Law Group] to Country [Mutual] regarding
examination under oath of Plaintiff . . .

9 Email from [Thenell Law Group] to Country [Mutual] regarding
10 coverage . . . [and]

11 Letter from Defendant to [Thenell Law Group] providing claim information
12 for coverage analysis. Attaches proof of loss received from insured.

13 (4th Am. Priv. Log (Dkt. # 30-5) at 2, 6.) Based on these descriptions, the court cannot
readily conclude whether the communications at issue involve "the quasi-fiduciary tasks
14 of investigation and evaluating or processing the claim" or "providing the insurer with
15 counsel as to its own liability." *See Cedell*, 295 P.3d at 246-47. The descriptions in the
16 privilege log would permit either conclusion. The descriptions also do not allow the
17 court to assess whether the civil fraud exception applies.

18 Thus, the court concludes that it must examine the documents. It appears that
19 relatively few documents remain in dispute (*see* Carsley Decl. (Dkt. # 32) Ex. A
20 (highlighting disputed documents)), so the court should have no difficulty reviewing
21 them *in camera*.

IV. CONCLUSION

2 For the foregoing reasons, the court ORDERS Country Mutual to submit the
3 documents at issue to the court for *in camera* review by Monday, August 18, 2014. The
4 court also DIRECTS the clerk to refile Country Mutual's renewed motion for protective
5 order (Dkt. # 29) for Monday, August 18, 2014.

6 Dated this 13th day of August, 2014.



JAMES L. ROBART
United States District Judge